No. 266

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CHARLES ELMORE CROPLEY

# IN THE SUPREME COURT of the United States

OCTOBER TERM, 1942

RESEARCH LABORATORIES, INC., *Petitioner*,

vs.

UNITED STATES OF AMERICA.

## PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

J. CHAS. DENNIS,
U. S. District Attorney, Seattle, Washington,
and
FRANK HALE,
Assistant U. S. District Attorney, Tacoma, Washington,
Attorneys for Respondent.
ALEXANDER G. BARRY, Portland, Oregon,
Attorney for Petitioner,
and
HARRY G. HOY, Portland, Oregon,
Of Counsel for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND 10671 10-42-5M

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## ON THE QUESTION PRESENTED

The Government has served and filed a Brief resisting the Petitioner's application for Writ of Certiorari. The Brief for the Government states that the question presented is as follows:

> "Whether misleading circulars 'accompany' a drug within the meaning of the Federal Food, Drug and Cosmetic Act, which defines 'labeling'

as including 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers, or wrappers, or (2) accompanying such article,' when they are shipped in interstate commerce from the same point of origin, arrive simultaneously at the same destination, and are displayed with the drug in retail stores."

On behalf of the Petitioner we respectfully submit that this recital is not a complete statement of the true question presented. We feel that the proposition before the Court should read somewhat as follows:

"Whether misleading circulars 'accompany' a drug within the meaning of the Federal Food, Drug and Cosmetic Act, which defines 'labeling' as including 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article,' when they are shipped *by a consignor* in interstate commerce from the same point of origin, arrive simultoneusly at the same destination, and are displayed *by the consignee* with the drug in retail stores, *even though traveling in a separate train, truck or other vehicle throughout the interstate journey.*"

## ARGUMENT

We feel that the court should have in mind the fact that while both the article and the advertising matter were shipped by one person, the two commodities traveled in different trains, trucks or other vehicles, and that another person, the consignee, was the one who placed them in close proximity, and

that this was done by this other person after receipt thereof, and after the interstate journey had been completed. The act of shipment was the act of the consignor, who shipped the two items (the drug and the circulars) separately; the act of placing the circulars in close proximity with the drug was the act of the consignee.

The circulars in question were "labeling" or they were "an advertisement". Under the statutes involved in this matter they could not constitute both "labeling" and a "false advertisement". I believe the Government and the Petitioner are in agreement on that proposition, although such doctrine is directly in conflict with the decision of the Circuit Court of Appeals which says that such "assumption is unwarranted". In making that statement it is quite clear that the Appellate Court lost sight of the plain wording of the statute to the effect that "the term 'false advertising' means an advertisement *other than labeling* which is misleading in a material respect".

It should be kept in mind that we are not now dealing with the usual respective meanings of the expressions "labeling" and "false advertisement", but are dealing with the statutory meanings thereof. Generally speaking, the "labeling" or "branding" of a drug is that which is attached to the container; however, the word as now employed by the Federal Food, Drug and Cosmetic Act includes not

only the label or labels, but also includes all "other written, printed or graphic matter (1) upon any article or any of its containers or wrappers or (2) accompanying such article". This definition of labeling is a purely statutory definition; and it is the office of the Court to make the distinction between "labeling" that constitutes misbranding in interstate commerce, and a "false advertisement" as that term is employed in the Federal Trade Act.

Clearly, it was the purpose of Congress to define and keep separate the respective jurisdictions of the Federal Trade Commission and the Food and Drug Administration. The former has jurisdiction over "false advertisements"; and the latter has jurisdiction over "misbranding", or labeling that is false and misleading.

It must be assumed for the purposes of this case that the circulars which were shipped in interstate commerce were false and misleading, but the Government and the Petitioner differ on whether or not those circulars constituted "labeling" of an article that did not travel with them at any time in interstate commerce or whether under such circumstances, they constituted a "false advertisement" within the meaning of the Federal Trade Act. We fully concur with the argument advanced by the Government that "no single argument has more weight in statutory interpretation than the plain meaning of the words of the statute"; and that "the

courts are not free to reject that meaning where no absurd result or thwarting of the statute follows and where, as here, it appears to be consonant with the purposes of the Act as plainly disclosed by its structure". However, we cannot agree with the assertion that the phrase "accompanying such article" plainly means (or means at all, for that matter) traveling in a separate train, truck or other vehicle. On the other hand, we do not think the phrase "accompanying such article" has any application to advertising matter unless that advertising matter does "accompany such article" in the generally accepted meaning of that phrase. To "accompany an article" in the generally accepted sense of that phrase the circulars must be with the article as the article travels in interstate commerce, at least to such extent that a complete loss of the carrying vehicle would result in a loss of both items; and to construe it otherwise is to give to the expression a strained and unnatural meaning.

Nor is it necessary for the protection of society that the words should be given this bizarre construction asked by the Government. If the circulars in question are not "labeling", then they are "advertising". True, if they are not "labeling" the Food and Drug Administration has no jurisdiction thereover, but they then become advertising; and if they constitute a "false advertisement" the Federal Trade Commission has jurisdiction over the matter on the ground that it constitutes unfair competition,

and the Petitioner's misconduct can be adequately dealt with by that tribunal.

As hereinbefore pointed out, it is a matter of mathematical demonstration that the circulars in this case cannot be a "false advertisement", under the jurisdiction of the Federal Trade Commission and at the same time be "labeling" under the jurisdiction of the Food and Drug Act. Which, then, are the circulars here involved? If the Petitioner were being proceeded against by the Federal Trade Commission upon the ground that the circulars in question were false and misleading and therefore constituted unfair competition, could any person present any reasonable argument against the jurisdiction of that tribunal? We believe not. Manifestly, these circulars are advertising matter. If they are false and misleading, it is perfectly clear that they constitute unfair competition within the meaning of the Federal Trade Act, as that Act has been construed by the Courts. We feel that it must be freely confessed that circulars containing false advertising relative to a drug, which are sent separate from the article itself, traveling in another train, truck or vehicle must be regarded as a "false advertisement", rather than "labeling". To hold otherwise would be to do violence to the plain meaning of the words employed.

Finally, if the circulars in this particular case, traveling separately from the drug, as they presum-

ably did, can be held to constitute "labeling" and therefore subject to the jurisdiction of the Food and Drug Administration, and not subject to the jurisdiction of the Federal Trade Commission (for, as pointed out above, they cannot be both "labeling" and a "false advertisement" at one and the same time) all other circulars, advertising any food, drug or cosmetic must also be construed to constitute labeling, and the jurisdiction of the Federal Trade Commission is thereby narrowed to a point that Congress and the Commission itself never dreamed of.

## CONCLUSION

The Brief submitted on behalf of the Government seems eminently fair, but far from convincing. While counsel for the Government assert that the case was correctly decided in the Circuit Court of Appeals, it seems quite apparent to the writer that they do not subscribe to the doctrine announced in the opinion written by the Circuit Court of Appeals (R. 65) that the circulars might constitute both "false advertising" and "labeling", taking those words in their statutory significance. As heretofore pointed out, the fact that this doctrine is untenable can be demonstrated, and has been demonstrated to a mathematical certainty. It has been made impossible by the statutory definition of the words "false advertisement". As stated, and repeated, in the

statute, a "false advertisement" is a representation of fact or opinion *other than labeling.* If to hold that the Federal Food, Drug and Cosmetic Act did not have jurisdiction in the instant case would subject the public to danger because the Petitioner would therefore go "unwhipped of justice" for a wrongful act, the decision of the Circuit Court of Appeals might be approved, or at least favored. But, since the Federal Trade Commission has jurisdiction adequately to correct the alleged misconduct of the Petitioner (and has, so it seems, had under consideration the issuance of a complaint based on this same circular) this suggested necessity for this decision does not exist.

In closing we respectfully submit that to place upon the words "accompanying the article" the strained and unnatural construction requested by the Government in this case would violate the well recognized rule that a criminal statute such as we have here, providing for heavy fines and for imprisonment up to three years, should be rather strictly construed.

Respectfully submitted,

ALEXANDER G. BARRY,
Attorney for Petitioner.

HARRY G. HOY,
Of Counsel.